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No. 07-512

In the Supreme Court of the United States

PACIFIC BELL TELEPHONE COMPANY,
DBA AT&T CALIFORNIA, ET AL., PETITIONERS

v.

LINKLINE COMMUNICATIONS, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a plaintiff states a claim under Section 2 of the Sherman Act, 15 U.S.C. 2, by alleging that the defendant—a vertically-integrated retail competitor with an alleged monopoly at the wholesale level—engaged in a "price squeeze" by leaving an insufficient margin between wholesale and retail prices to allow the plaintiff to compete, when the defendant has no antitrust duty to provide the wholesale input to the plaintiff.

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INTEREST OF THE UNITED STATES

The Department of Justice is responsible for enforcing the federal antitrust laws and has a strong interest in the correct application of those laws. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. Petitioners are various affiliates of a dominant regional telephone company that provides telephone and data transmission services, including digital subscriber line (DSL) Internet service, to retail consumers over its telecommunications infrastructure and facilities. Respondents are Internet service providers (ISPs) that also sell DSL service at retail, in competition with petitioners. Pet. App.

2a-3a. Because petitioners own the requisite infrastructure and facilities, including local telephone lines (*id.* at 2a-3a & n.1), respondents leased "DSL transport" from petitioners on a wholesale basis.[1] Consequently, petitioners supplied respondents at wholesale with a necessary input to their DSL service and also competed with respondents in providing a "bundled package" of online service and equipment, including DSL service, to consumers. *Id.* at 2a-3a; see J.A. 17 (¶ 19); see also J.A. 12 (¶ 8) (petitioners sold Internet access service along with DSL); J.A. 13-14 (¶ 12) (listing various services incorporated into Internet service).

Petitioners did not supply respondents voluntarily, but rather because federal telecommunications law required them to do so. Pet. App. 5a n.6.[2] As the district court concluded (*id.* at 78a-85a), rules adopted by the Federal Communications Commission (FCC) pursuant to the Communications Act of 1934 obligated petitioners to offer respondents "nondiscriminatory access" to DSL transport at "just and reasonable" rates. *Id.* at 83a-84a (citing 47 U.S.C. 201; *Review of Regulatory Requirements for Incumbent LEC Broadband Telecomm. Servs.*, 17 F.C.C.R. 27,000, 27,010, ¶ 18 (2002); *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 16 F.C.C.R. 7418, 7445-7446, ¶ 46 (2001)).[3]

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[1] For industry technical and economic background, see Robert W. Crandall & Hal J. Singer, *Are Vertically Integrated DSL Providers Squeezing Unaffiliated ISPs (and Should We Care)?, in* Access Pricing: Theory and Practice 421, 424-440 (Ralf Dewenter & Justus Haucap eds., 2007).

[2] Respondents did not dispute that point on appeal. Pet. App. 5a n.6.

[3] For many local telephone companies, the FCC has eliminated the obligation to provide DSL transport as a condition of entering the market for DSL-based Internet-access service, in part because of the prevalence of other technologies (such as cable modem service) that provide similar high-speed Internet connections. See *Appropriate*

Respondents sued petitioners in July 2003, alleging monopolization and attempted monopolization of the regional DSL market in violation of Section 2 of the Sherman Act, 15 U.S.C. 2. See J.A. 10-24. Respondents alleged that petitioners had "created a price squeeze by charging [respondents] a high wholesale price in relation to the price at which [petitioners] were providing retail services," J.A. 18 (¶ 23(a)), and that this "price squeeze" placed respondents at a "serious unfair disadvantage," J.A. 17 (¶ 19). The district court described respondents' other allegations of improper conduct by petitioners, J.A. 19 (¶ 23(b)-(f)), as "refusal to deal" and "denial of access to an essential facility." Pet. App. 77a.

2. After this Court's decision in *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP,* 540 U.S. 398 (2004), petitioners moved for judgment on the pleadings, contending that *Trinko* compelled judgment in their favor. Pet. App. 65a. In an October 2004 order (2004 Order), the district court granted petitioners' motion as to respondents' refusal-to-deal and essential-facility allegations, *id.* at 77a-86a, 90a-91a, but denied the motion as to the price-squeeze claim, *id.* at 86a-91a.

The court held that *Trinko* did not "directly" bar a claim based on price-squeeze allegations, rejecting petitioners' argument that "a price squeeze claim is essentially a

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Framework for Broadband Access to the Internet over Wireline Facilities, 20 F.C.C.R. 14,853, 14,873 ¶ 33, 14,881-14,882 ¶ 51 (2005), petitions for review denied *sub nom.*, *Time Warner Telecom, Inc.* v. *FCC*, 507 F.3d 205 (3d Cir. 2007). As a condition of the FCC's approval of a recent merger, however, petitioners remain under an obligation to provide DSL transport at a price no higher than the retail rate they charge for retail DSL-based Internet-access service. See *AT&T Inc. & BellSouth Corp. Application for Transfer of Control*, 22 F.C.C.R. 5662, 5814-5815, App. F, on partial reconsideration on other grounds, 22 F.C.C.R. 6285 (2007).

refusal-to-deal claim," *i.e.*, "a claim that Firm One is refusing to deal with Firm Two on Firm Two's price terms." Pet. App. 86a. Although the court acknowledged that petitioners' argument "has a certain logic to it," the court rejected the argument on the ground that not all refusal-to-deal claims can "be reframed as price-squeeze claims." *Id.* at 86a-87a. The court also stated that, "to the extent that price-squeeze claims are subject to the requirements set forth in *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), [for predatory-pricing claims,] then the transmutability of refusal-to-deal claims is limited still more." *Ibid.*

The district court also rejected petitioners' argument that "price squeeze liability is inappropriate where, as here, wholesale prices are regulated by a federal regulatory agency." Pet. App. 87a-88a. The court observed that *Trinko* pointed to the "existence of a regulatory structure designed to deter and remedy anticompetitive harm" as a reason not to expand the scope of Section 2 liability. *Id.* at 88a (quoting *Trinko*, 540 U.S. at 412). The court concluded, however, that regulation of petitioners' wholesale prices was not determinative because, under governing Ninth Circuit precedent, the existence of a regulatory structure does not preclude antitrust liability for a price squeeze, *id.* at 88a-89a (citing *City of Anaheim* v. *Southern Cal. Edison Co.*, 955 F.2d 1373 (1992)), and such a claim "falls within the range of recognized Section 2 claims," *id.* at 90a. Accordingly, the court held that "*Trinko* does not bar [respondents'] price-squeezing claim." *Id.* at 91a.

The district court did not reach petitioners' "objections to the legal sufficiency of [respondents'] price-squeeze claim which [did] not derive from *Trinko*," Pet. App. 91a, including petitioners' argument that the complaint failed to satisfy the *Brooke Group* requirements—*i.e.*, allegations of pricing below an appropriate measure of costs and a dan-

gerous probability of recoupment. See 03-5265 Mem. in Supp. of J. on Pleadings 15. The court instead ordered respondents to file an amended complaint detailing the specific facts supporting their price-squeeze claim. Pet. App. 91a.

3. Respondents filed an amended complaint (J.A. 25-42), and petitioners then moved to dismiss it, arguing *inter alia* that price-squeeze claims must satisfy the *Brooke Group* requirements and that the amended complaint failed to do so. Pet. App. 36a. In an April 2005 order (2005 Order), the district court denied that motion. *Id.* at 25a-57a. Although the court found the "policy arguments" for applying the *Brooke Group* requirements "persuasive," *id*. at 47a, the court concluded that it was unnecessary to resolve that "difficult issue" because it concluded that the amended complaint would satisfy the *Brooke Group* requirements when "generously construed" in accordance with the "no set of facts" standard of *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). Pet. App. 49a, 56a.

The district court granted petitioners' alternative request to amend the 2004 Order to certify it for interlocutory appeal pursuant to 28 U.S.C. 1292(b), identifying the "controlling question of law" as "whether *Trinko* bars price squeeze claims in a fully regulated industry" in which "the parties are compelled to deal under the federal communications laws." Pet. App. 53a, 56a-57a. The court stated that "the issue before the Ninth Circuit will not only be whether *Trinko* bars price squeeze claims generally but, more specifically, whether it bars predatory price squeeze claims (i.e., price squeeze claims which comply with the *Brooke Group* requirements)." *Id.* at 56a n.22.[4]

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[4] No single district court order contains both the statutory certification requirements and the order certified in haec verba. Cf. 28 U.S.C. 1292(b) (providing that district court's finding requisite to appeal

4. The court of appeals granted permission to appeal, Pet. App. 92a, and a divided panel affirmed, *id.* at 1a-24a.

a. The panel majority framed the question presented as whether *Trinko* bars price-squeeze claims against a defendant "who has no duty to deal with the plaintiff absent statutory compulsion." Pet. App. 1a. The majority explained that a price squeeze occurs "when a vertically integrated company sets its prices or rates at the first (or 'upstream') level so high that its customers cannot compete with it in the second-level (or 'downstream') market." *Id.* at 8a (quoting 2 Julian O. von Kalinowski et al., *Antitrust Laws and Trade Regulation* § 27.04[1], at 27-40 (2d ed. 2007)). It stated that federal courts have recognized the viability of such price-squeeze claims under the Sherman Act since *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945). Pet. App. 8a-9a. The panel majority declined to reconsider, and instead reaffirmed, the Ninth Circuit's *Anaheim* decision, which held that price-squeeze claims are "viable against monopolists in regulated industries" if the plaintiff proves "specific intent on the part of the wholesale monopoly holder." *Id.* at 9a, 14a.

The majority reasoned that "*Trinko* did not * * * completely eliminate the viability of a § 2 price squeeze theory in regulated industries." Pet. App. 15a. To the contrary, the majority concluded that *Anaheim* was "consis-

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pursuant to the provision shall be "state[d] in writing in" the order certified for appeal). However, as explained in the United States's brief at the petition stage (at 18-19), by granting petitioners' motion to "amend this Court's October 20, 2004 Order to certify for interlocutory review so much of the Order as permits [respondents'] price-squeeze claim to proceed," 03-5265 Mot. to Strike, Dismiss, or Certify 1, the district court necessarily granted the request to amend the 2004 Order as the statute requires. See, *e.g.*, Fed. R. App. P. 5(a)(3) ("the district court may amend its order * * * to include the required permission or statement"); *In re Hamilton*, 122 F.3d 13, 14 (7th Cir. 1997).

tent with *Trinko*" in "reject[ing] the wholesale importation of antitrust theory as applicable to regulated industries." *Ibid.* The majority stated that in "any future application of *Anaheim*" the court would "ensure consistency with *Trinko*." *Id*. at 16a.

Applying *Anaheim* and *Trinko*, the court upheld the district court's denial of judgment on the pleadings. Pet. App. 16a-19a. It emphasized that the FCC regulates only "the wholesale prices [petitioners] charged [respondents]; there is no comparable regulatory attention paid to the retail DSL market. Any restrictions on pricing at the retail level derive primarily from the antitrust laws." *Id*. at 18a. The court stated that it was "unclear at this juncture the extent to which [respondents are] basing [their] § 2 price squeezing theory on wholesale pricing, retail pricing, or both." *Ibid.* But, "since [respondents] could prove facts, consistent with [their] complaint, that involve only unregulated behavior at the retail level, [their] action or lawsuit survives a motion for judgment on the pleadings." *Ibid.* The court thus concluded that the price-squeeze allegation "states a potentially valid claim" under Section 2. *Id.* at 19a.

b. Judge Gould dissented, concluding that the district court should have dismissed the amended complaint in its entirety. Pet. App. 19a-24a. In his view, *Trinko* "takes the issues of wholesale pricing out of the case, and thus transforms what is left of any claim of 'price squeeze.'" *Id* . at 20a. Therefore, he concluded, "the retail side of a price squeeze cannot be considered to create an antitrust violation if the retail pricing does not satisfy the requirements of *Brooke Group*." *Id.* at 23a. Judge Gould concluded that the amended complaint did not satisfy that standard, although he found "just enough possibility of an injury" to

warrant permitting respondents a further opportunity to amend the complaint. *Id.* at 23a, 24a n.2.[5]

SUMMARY OF ARGUMENT

The court of appeals erred in recognizing a claim under Section 2 of the Sherman Act based solely on allegations that a vertically-integrated company with an alleged monopoly at the wholesale level, but with no antitrust duty to provide that wholesale input to its retail competitors, engaged in a "price squeeze" by leaving an insufficient margin between wholesale and retail prices to allow its retail competitors to compete.

A. In the absence of an antitrust duty to deal, an allegation that a vertically-integrated defendant's wholesale prices are too high in relation to its retail prices for retail-level rivals to compete does not allege a claim under Section 2 of the Sherman Act. As this Court held in *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), a statutory or regulatory requirement to deal with rivals does not automatically establish an *anti-*

[5] The court of appeals discussed both the 2004 and 2005 Orders and, in its paragraph summarizing the 2005 Order, stated that the district court certified "the order" for interlocutory appeal. Pet. App. 8a. In the end, however, it affirmed the district court's denial of petitioners' "motion for judgment on the pleadings," *id.* at 19a, which was the ruling in the 2004 Order, not the 2005 Order.

As explained in the government's brief at the petition stage (at 17-19), it could be argued that both the 2004 and 2005 orders were properly before the court of appeals. Regardless of whether the 2005 Order was properly before the court of appeals, however, that court did have jurisdiction to review the propriety of the 2004 Order denying petitioners' motion for judgment with respect to the original complaint. See note 4, *supra*. The court resolved that issue in favor of respondents, holding that price-squeeze claims remain viable after *Trinko* and that the Ninth Circuit's recognition of such claims in *Anaheim* in the context of regulated industries remains good law. Pet. App. 8a-16a. This Court possesses jurisdiction to review those holdings.

trust duty to deal. Because petitioners had no antitrust duty to deal with respondents at the wholesale level, petitioners had no duty under the antitrust laws to provide respondents with any particular wholesale price terms. Accordingly, respondents' claim that petitioners' wholesale prices were too high for respondents to compete at retail fails to state a Section 2 claim.

B. Nor is respondents' allegation that petitioners' retail prices are too low for them to compete sufficient to state a claim under Section 2. To state a claim based on petitioners' retail prices, respondents would have to allege the two requirements established by this Court for predatory-pricing claims: (1) that petitioners' retail prices are below an appropriate measure of their costs, and (2) that petitioners have a dangerous probability of recouping their investment in below-cost prices. See *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). In the absence of any such allegations, the antitrust laws risk punishing the very conduct they are designed to protect: vigorous price competition on the merits.

C. The Ninth Circuit erred in allowing respondents to proceed on their claims in the absence of an antitrust duty to deal or predatory-pricing allegations. A claim based solely on the assertedly insufficient margin between a vertically-integrated defendant's wholesale and retail prices would protect competitors, not competition or consumers. Low retail prices benefit consumers, regardless of how they are set, as long as they are above predatory levels. And a monopolist's high wholesale price is generally not in itself unlawful because, as this Court has recognized, collecting a monopoly profit is part of the free-market system.

In permitting respondents' price-squeeze claim to proceed, the Ninth Circuit relied on *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945). But that

decision—which recognized a price-squeeze claim based on the notion that the vertically-integrated defendant charged more than a "fair price" for an upstream input such that its downstream rivals could not make a "living profit"—reflects an improper focus on the protection of competitors. Recognizing such a claim would displace the free-market price-setting mechanism and would place the antitrust court in the role of rate-setter, requiring it in most situations either to hold down the upstream price or impose a supracompetitive downstream price. Antitrust courts are ill-suited for that role.

ARGUMENT

Section 2 of the Sherman Act does not provide a cause of action for price-squeeze claims of the type at issue here—namely, allegations that a vertically-integrated company, with no antitrust duty to deal with its competitors, "created a price squeeze by charging [its retail competitors] a high wholesale price in relation to the price at which [it was] providing retail services," J.A. 18 (¶ 23(a)), such that it placed its competitors at a "serious unfair disadvantage," J.A. 17 (¶ 19). To accept such a price-squeeze theory, and thus premise antitrust liability on an assertedly inadequate margin between a defendant's wholesale and retail prices, would recognize an antitrust claim involving no allegations of conduct that harms competition in a way the antitrust laws forbid. Such a theory of liability cannot be reconciled with this Court's modern antitrust jurisprudence or the sound principles on which that jurisprudence is based. In particular, this Court's decision in *Trinko* forecloses respondents' claims that petitioners' wholesale prices are too high. And respondents' claim that petitioners' retail prices are too low cannot survive in the absence of allegations satisfying the requirements for a predatory-pricing claim set forth by this Court in *Brooke Group*. Despite the absence of such

allegations, the court of appeals allowed respondents' complaint to proceed. That erroneous decision threatens to chill retail price-cutting by vertically-integrated firms and to encourage litigation designed to protect competitors at the expense of competition, thereby undermining the procompetitive purposes of the antitrust laws and harming consumers.

A PRICE-SQUEEZE ALLEGATION BASED SOLELY ON THE MARGIN BETWEEN A VERTICALLY-INTEGRATED DEFENDANT'S WHOLESALE AND RETAIL PRICES IS INSUFFICIENT TO STATE A CLAIM UNDER SECTION 2 OF THE SHERMAN ACT

A. Absent An Antitrust Duty To Deal, A Claim That A Vertically-Integrated Defendant's Wholesale Prices Are Too High For Rivals To Compete At Retail Does Not Allege A Section 2 Claim

1. In *Trinko*, this Court held that allegations of insufficient assistance to rivals by a dominant telecommunications carrier with respect to services required by the telecommunications laws did not state a claim under Section 2 of the Sherman Act. 540 U.S. at 407-416. In that case, the plaintiff claimed that Verizon had breached its duties under the telecommunications laws by "fill[ing] rivals' orders on a discriminatory basis as part of an anticompetitive scheme to discourage customers from becoming or remaining customers" of its rivals, thus impeding rivals' "ability to enter and compete in the market for local telephone service." *Id.* at 404.

In rejecting that claim, the Court first held that a statutory and regulatory requirement to deal with rivals does not automatically establish a duty to deal for purposes of the antitrust laws. *Trinko*, 540 U.S. at 405-407. Rather, the Court reasoned, if the allegation that Verizon denied inter-

connection services to rivals in order to limit entry "state[d] an antitrust claim at all, it [did] so under § 2 of the Sherman Act." *Id.* at 407. And the Court concluded that such an allegation did not state a Section 2 claim, holding that Verizon had no antitrust duty to assist its rivals in the circumstances of that case. *Id.* at 407-416.

In so holding, the Court distinguished *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), describing that decision as "at or near the outer boundary of § 2 liability." *Trinko*, 540 U.S. at 409. In *Aspen*, the Court held that a particular refusal to deal with a competitor amounted to exclusionary conduct. 472 U.S. at 605-611. There, the defendant (which owned three of the four mountain areas in the Aspen ski area) and the plaintiff (which owned the fourth mountain area) had cooperated for years in the issuance of a joint ski ticket. After repeatedly demanding an increased share of the profits, the defendant refused to continue to participate in the joint ticket, even refusing to sell its tickets to the plaintiff at retail prices. *Id.* at 593-594.

Contrasting those facts with the allegations in *Trinko*, the *Trinko* Court emphasized the absence of any allegation that Verizon "voluntarily engaged in a course of dealing with its rivals, or would ever have done so absent statutory compulsion." 540 U.S. at 409. *Trinko* thus held that "Verizon's alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim under this Court's existing refusal-to-deal precedents." *Id.* at 410.

The Court further concluded that "traditional antitrust principles" did not justify expanding "the few existing exceptions from the proposition that there is no duty to aid competitors," especially given "the existence of a regulatory structure designed to deter and remedy anticompetitive harm." *Trinko*, 540 U.S. at 411-412. Moreover, the Court noted that conduct constituting an anticompetitive breach

of the telecommunications laws may be "beyond the practical ability of a judicial tribunal to control." *Id.* at 414 (quoting *Brooke Group*, 509 U.S. at 223). The Court explained that "[e]ffective remediation of violations of regulatory sharing requirements will ordinarily require continuing supervision of a highly detailed decree." *Id.* at 414-415. And it concluded that "[n]o court should impose a duty to deal that it cannot explain or adequately and reasonably supervise." *Id.* at 415 (quoting Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, 853 (1989)).

2. Like the claims in *Trinko*, respondents' price-squeeze allegations amount to nothing more than a claim that petitioners refused to deal on terms that respondents desired. Respondents' original complaint was based on the allegedly "high wholesale price" that petitioners charged respondents "in relation to the price at which [petitioners] were providing retail services." J.A. 18 (¶ 23(a)).[6] But as the case comes to this Court, petitioners had no antitrust duty to deal with respondents at the wholesale level (see Pet. App. 1a, 85a), and thus no *antitrust* duty to provide respondents with any particular wholesale price terms. Rather, like the interconnection services Verizon provided in *Trinko*, petitioners provided DSL transport to respondents only under compulsion of the telecommunications laws. *Id.* at 5a n.6, 77a-85a.[7]

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[6] Because the district court assessed only the viability of the original complaint in the 2004 Order (which is the only order the district court unambiguously certified for appeal, see notes 4-5, *supra*), the discussion in text focuses on that complaint. The analysis would be the same if the allegations of the amended complaint were considered, because those allegations likewise turn on the allegedly insufficient margin between wholesale and retail prices. Pet. App. 5a-8a.

[7] In opposition to the certiorari petition, respondents argued that petitioners had an antitrust duty to deal cognizable under *Aspen*, based

From the standpoint of federal antitrust law, therefore, there would be no antitrust violation if petitioners refused to deal with respondents altogether (and thereby barred them from the retail market entirely). It necessarily follows that there can be no valid price-squeeze claim based merely on allegations that petitioners charged "wholesale prices that were too high in relation to what petitioners were charging their retail DSL customers" (Br. in Opp. 1), because that conduct amounts to nothing more than a refusal to deal with respondents on advantageous terms. A defendant that has no duty to deal with rivals by definition has no duty to deal with them on particular terms that would permit them to compete.[8]

Moreover, as this Court recognized in *Trinko*, the antitrust laws should not be used to enforce what boils down to a regulatory obligation to deal. Petitioners are obligated to offer respondents DSL transport at just, reasonable, and nondiscriminatory rates, and the FCC has authority to enforce that obligation with respect to petitioners' wholesale rates. See pp. 2-3, *supra*. As this Court recognized in *Trinko*, an "antitrust court is unlikely to be an effective

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on the contention that petitioners had "refus[ed] to provide competitors the same services or prices made available to their retail customers." Br. in Opp. 24. Neither the court of appeals nor the district court addressed that argument, presumably because the complaint contains no suggestion that respondents ever sought, or desired, to purchase from petitioners the bundled Internet access service (incorporating DSL transport) that petitioners sold at retail. See J.A. 12, 13-14, 17 (¶¶ 8, 12, 19). In any event, that issue is not fairly encompassed within the question presented, which explicitly assumes "no antitrust duty to provide the wholesale input to competitors." Pet. i.

[8] Indeed, even if a plaintiff could properly allege in a particular case that the defendant's pricing did constitute a breach of an antitrust duty to deal, characterizing that pricing as creating a "price squeeze" would add nothing to the allegation of an anticompetitive refusal to deal.

day-to-day enforcer" of the detailed obligations of the telecommunications laws. 540 U.S. at 415.

Petitioners suggest (Pet. Br. 35-37) that the existence of regulatory oversight provides an additional reason not to recognize a price-squeeze claim in this context. But there is no need for the Court to reach that argument. Regulatory enforcement should not displace antitrust enforcement unless the criteria for implied immunity are satisfied. The key point here is that, with or without a regulatory scheme, the antitrust laws should not be construed to forbid a mere margin-based price squeeze, because such a prohibition would represent unsound antitrust policy and conflict with this Court's modern antitrust jurisprudence. Accordingly, respondents' allegations that the margin between petitioners' wholesale and retail prices impeded their ability to compete (J.A. 17, 18 (¶¶ 19, 23(a)); Br. in Opp. 1) fare no better than the similar allegations regarding the provision of inadequate wholesale services in *Trinko*.

B. A Claim That A Vertically-Integrated Defendant's Retail Prices Are Too Low For A Rival To Compete At Retail Does Not State A Section 2 Claim In The Absence of Predatory-Pricing Allegations

1. Given that respondents' allegations regarding petitioners' wholesale prices do not furnish a basis for a claim under Section 2 of the Sherman Act, any antitrust claim arising out of petitioners' pricing would have to be based on their retail prices. But to allege a viable Section 2 claim based on retail prices, it would not be enough for respondents to claim that petitioners' retail prices were too low for respondents to compete. As this Court explained in *Brooke Group*, when "the essence of the claim" under Section 2 is that a "business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the

relevant market," "two prerequisites" must be met. 509 U.S. at 222. The plaintiff must prove that (1) "the prices complained of are below an appropriate measure of its rival's costs," *ibid.*, and (2) "the competitor had * * * a dangerous probability[] of recouping its investment in below-cost prices," *id.* at 224.[9]

In establishing that two-pronged standard, the Court reiterated its rejection of "the notion that above-cost prices that are below general market levels or the costs of a firm's competitors inflict injury to competition cognizable under the antitrust laws." *Brooke Group*, 509 U.S. at 223 (citing *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 340 (1990)). As the Court explained, the below-cost-pricing prong is necessary because "[l]ow prices benefit consumers regardless of how those prices are set," *id.* at 223 (quoting *Atlantic Richfield*, 495 U.S. at 340), and when a company sets its price above the cost of its product, a low price often "reflects the lower cost structure of the alleged predator, and so represents competition on the merits." *Ibid.* The Court also emphasized the importance of the recoupment prong, observing that price cutting that does not result in recoupment produces lower prices in the market, thereby actually enhancing consumer welfare. *Id.* at 224.

2. Here, respondents' original complaint nowhere alleged that petitioners' retail prices were below an appropriate measure of petitioners' costs, or that there was a dangerous probability of recoupment. Hence, respondents do not contend, and there is no basis for suggesting, that the

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[9] Although *Brooke Group* involved a claim for primary-line price discrimination under the Robinson-Patman Anti-Discrimination Act, 15 U.S.C. 13(a), rather than a predatory-pricing claim under Section 2 of the Sherman Act, the Court made clear that the same "two prerequisites to recovery" apply "whether the claim alleges predatory pricing under § 2 of the Sherman Act or primary-line price discrimination under the Robinson-Patman Act." 509 U.S. at 222.

original complaint alleged the elements of a predatory-pricing claim under *Brooke Group*. See *Brooke Group*, 509 U.S. at 222-224.

Although respondents contended in opposing certiorari (Br. in Opp. 14) that they have alleged a claim of "predatory" pricing, that contention is based on allegations in the amended complaint. The district court concluded in its 2005 Order that those allegations were sufficient to satisfy the *Brooke Group* requisites if "generously construed." Pet. App. 56a. As noted above (note 5, *supra*), however, it is unclear whether the 2005 Order and the amended complaint are properly at issue in this interlocutory appeal. And even if the amended complaint and the 2005 Order are properly at issue, the amended complaint's allegations are insufficient to satisfy *Brooke Group*.[10]

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[10] As the dissenting judge below correctly concluded (without any expression of disagreement from the majority), the amended complaint "does not allege" either that petitioners priced their retail product "below cost" or that petitioners "had any realistic prospect of recouping losses." Pet. App. 20a. Indeed, even the district court acknowledged that, "strictly construed, the [amended complaint] falls short in a number of respects," *id.* at 49a, noting that it lacks a factual allegation that "[petitioners'] prices are below a relevant measure of [petitioners'] costs," *id.* at 50a, and lacks an allegation of "a dangerous probability of recoupment within the meaning of *Brooke Group*," *id.* at 51a-52a. Instead, the amended complaint contains only a "conditional if-then statement" that "approximat[es]" an allegation of below-cost pricing, *id.* at 50a, and "something akin to" an allegation of recoupment, *id.* at 51a-52a. See J.A. 34-36 (¶ 25(A)(1)-(3)). In concluding that those allegations were nevertheless sufficient to satisfy *Brooke Group*, the district court relied on the proposition that dismissal is inappropriate unless "the plaintiff can prove no set of facts" that "would entitle him to relief." Pet. App. 49a (quoting *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957)). That view of the applicable pleading requirements, of course, was subsequently repudiated by this Court in *Bell Atlantic Corp.* v. *Twombly*, 127 S. Ct. 1955, 1969 (2007).

More to the point, whether or not respondents have a predatory-pricing claim that would satisfy the *Brooke Group* criteria, their claim is valid in the Ninth Circuit, because that court does not require satisfaction of those criteria. The court of appeals did not address the sufficiency of respondents' allegations under *Brooke Group* or hold that price-squeeze claims must satisfy the *Brooke Group* standard in order to survive a motion to dismiss. Indeed, the majority did not even discuss the subject of "predatory" pricing at any point in its opinion, notwithstanding the dissent's extended analysis of that issue. As explained below, the Ninth Circuit erred in allowing respondents to proceed on such a claim.

C. The Ninth Circuit Erred In Recognizing A Claim Under Section 2 Based Solely On The Margin Between A Vertically-Integrated Defendant's Wholesale And Retail Prices

Despite the absence of either an antitrust duty to deal or an allegation of predatory pricing, the Ninth Circuit allowed respondents to proceed on their complaint. In the Ninth Circuit's view, "[b]ecause a price squeeze theory formed part of the fabric of traditional antitrust law prior to *Trinko*, those claims should remain viable notwithstanding either the telecommunications statutes or *Trinko*." Pet. App. 14a. Some lower federal courts have "recognized price squeeze allegations as stating valid claims under the Sherman Act," *id.* at 8a-9a, beginning with *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (*Alcoa*). Like the "'essential facilities' doctrine crafted by some lower courts," *Trinko*, 540 U.S. at 410, however, the price-squeeze theory of antitrust liability has never been recognized by this Court. The Ninth Circuit erred in reaffirming the viability of pure price-squeeze claims in the circumstances here. *Trinko* and *Brooke Group*, and the sound antitrust principles on which they are based, combine

to bar price-squeeze claims that are based solely on the margin between an integrated defendant's wholesale and retail prices.

1. As this Court's cases make clear, in the absence of anticompetitive conduct, Section 2 does not condemn unilateral action that disadvantages a rival. See, *e.g.*, *Trinko*, 540 U.S. at 407 (monopolization); *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 456-460 (1993) (attempted monopolization). Whether one competitor inflicts "painful losses" on another "is of no moment to the antitrust laws if competition is not injured," because "[i]t is axiomatic that the antitrust laws were passed for 'the protection of *competition*, not *competitors*.'" *Brooke Group*, 509 U.S. at 224 (quoting *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962)); see *Weyerhaeuser Co.* v. *Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069, 1077-1078 (2007). Even a firm with monopoly power has no general duty under the antitrust laws to assist its rivals. See *Trinko,* 540 U.S. at 407-409.

A price-squeeze theory focused solely on the margin between a vertically-integrated firm's retail price and the wholesale price at which it sells an essential input to retail competitors, see Pet. App. 8a, is inconsistent with those principles. As a leading antitrust treatise explains, "[m]ost" price squeezes are not "invidious." 3A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 767c at 126 (2d ed. 2002) (*Antitrust Law*); see *ibid.* (observing that "it is difficult to see any *competitive* significance apart from the consequences of vertical integration itself, which may be adverse, neutral, or beneficial").

As this Court reiterated in *Brooke Group*, 509 U.S. at 223, a low retail price is ordinarily benign or procompetitive because "[l]ow prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition." *Atlantic Richfield*, 495 U.S. at 340. This Court has adhered to that

principle "regardless of the type of antitrust claim involved." *Ibid.* By the same token, a high upstream price is ordinarily lawful because the "charging of monopoly prices[] is not only not unlawful; it is an important element of the free-market system." *Trinko*, 540 U.S. at 407.[11] Indeed, price squeezes may occur "even in perfectly competitive markets" as a result of changing cost or demand conditions, particularly when an upstream product is a component of multiple downstream products facing different demand conditions. 3A *Antitrust Law* ¶ 767c at 127.

A price squeeze may disadvantage rivals, but as then-Judge Breyer explained for the First Circuit, "[m]erely eliminating competitors is not necessarily anticompetitive." *Town of Concord* v. *Boston Edison Co.*, 915 F.2d 17, 23 (1990), cert. denied, 499 U.S. 931 (1991).[12] In particular,

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[11] For that reason, even if a monopolist might have an antitrust duty to deal with his downstream competitors in particular circumstances, it would not necessarily follow that it must deal at less than the monopoly price. Yet if downstream competitors must pay monopoly prices for an important component of what they sell while competing against the monopolist, whose cost to produce that input is below the monopoly price, they are likely to face a margin-based price squeeze.

[12] In *Town of Concord*, the First Circuit declined to recognize a price-squeeze claim in a fully-regulated industry. 915 F.2d at 25-29. But the court did not uncritically accept the viability of a price-squeeze claim even in an unregulated market. It noted that to reach the conclusion that "the price squeeze is exclusionary, one must believe that the anticompetitive risks associated with a price squeeze outweigh the possible benefits and the adverse administrative considerations." *Ibid.* The court did not endorse that belief, however. It noted only that it did not question that conclusion in *Town of Concord* itself, but rather qualified it by observing that "the harms and benefits" of a price squeeze are "closely balanced." *Id.* at 25. The court's evident doubts about such a theory foreshadowed subsequent decisions of this Court that make clear that recognizing a price-squeeze claim based solely on the margin between a vertically-integrated defendant's wholesale and retail prices is inconsistent with the goals of antitrust law.

there are "at least two traditional circumstances in which prices that create a squeeze might simultaneously bring about economic benefits." *Id.* at 24. First, the upstream monopolist may be more efficient downstream than its downstream competitors. The squeeze may be attributable to the lower downstream prices brought about by that greater efficiency. *Ibid.*

Second, the upstream monopolist's entry into the downstream market, even if accompanied by a price squeeze, should lead to lower downstream prices if the downstream market was also characterized by monopoly before that entry. *Town of Concord*, 915 F.2d at 24. The downstream price is higher with two separate, successive monopolists than with a single monopolist over both markets. *Ibid.* By essentially the same logic, downstream prices may decline when the competing products in the downstream market are differentiated (*i.e.*, similar but not identical), and, after engaging in a price squeeze, the upstream monopolist then sells not only its own product but the product of the squeezed-out competitor. See Dennis W. Carlton, *Should "Price Squeeze" Be a Recognized Form of Anticompetitive Conduct?*, 4 J. Competition L. & Econ. 271, 276 (2008).

2. In allowing respondents' price-squeeze claim to survive, the Ninth Circuit relied (Pet. App. 8a-9a), as have other lower courts, on the Second Circuit's decision in *Alcoa*. See, *e.g.*, *Town of Concord*, 915 F.2d at 18 (quoting *Alcoa*'s standard for finding price-squeeze liability and citing three post-*Alcoa* decisions "using substantially similar language" and reaching "the same conclusion"). But *Alcoa* reflects an improper (and, under this Court's decisions, outmoded) focus on the economic well-being of particular competitors, rather than on the protection of competition.

In *Alcoa*, the court of appeals, on certificate from this Court, concluded that Alcoa had violated Section 2 by monopolizing the manufacture and sale of virgin aluminum

ingot, from which sheet is made. 148 F.2d at 432. The *Alcoa* court then turned to the government's ancillary allegations, see *id.* at 422, including a price-squeeze claim. The gravamen of the alleged price squeeze was that independent sheet rollers, which purchased ingot mainly from Alcoa, were squeezed between the pincers of Alcoa's high price for ingot and the low price at which Alcoa itself sold sheet, and they therefore could not make a "living profit." *Id.* at 437.[13] The court deemed the conduct unlawful to the extent that the price of ingot was "higher than a 'fair price.'" *Id.* at 438.[14]

To determine whether Alcoa's ingot price was higher than a "fair price," the court took the price that Alcoa charged its competitors for ingot, added a "fair measure" of its competitors' costs of rolling the ingot into sheet (derived from Alcoa's costs of rolling sheet), and subtracted the sum from the price Alcoa charged for sheet, yielding a measure of the profit available to the independent rollers. *Alcoa*, 148

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[13] Independent fabricators of consumer products, such as cookware, made from aluminum sheet purchased on the open market, were also affected by the margin. As the *Alcoa* district court noted, while independent sheet rollers were complaining to Alcoa that the margin was too small, those independent fabricators, which competed against firms that were sheet rollers as well as fabricators of consumer products, were complaining to Alcoa that the margin was too large, leaving them at a competitive disadvantage in markets for consumer products made from aluminum. *United States* v. *Aluminum Co. of Am.*, 44 F. Supp. 97, 213-214 (S.D.N.Y. 1941), aff'd in part, rev'd in part, and remanded, 148 F.2d 416 (2d Cir. 1945). As the district court observed, Alcoa was subjected to a "cross-fire * * * by its competitors and customers." *Id.* at 213.

[14] The exercise of power that the court identified as wrongful was not charging too low a price for sheet, since "the 'squeeze' was eliminated by lowering the price of ingot" beginning in 1933, *Alcoa*, 148 F.2d at 437, rather than by raising the price of sheet.

F.2d at 437.[15] On this basis, the court concluded that Alcoa's pre-1933 prices for ingot were higher than a "fair price," because the profit available to competitors was small or, in some instances, nonexistent. *Ibid.*

The *Alcoa* court acknowledged that the high ingot price was "a consequence of" Alcoa's ingot monopoly, lawful or unlawful, "and perhaps * * * ought not to be considered as a separate wrong." 148 F.2d at 438. Moreover, the court did not "use it as part of the reasoning by which [it] conclude[d] that the monopoly was unlawful." *Ibid.* The court also "assent[ed] to the [district court's] finding that [the price squeeze] was not part of an attempt to monopolize the 'sheet' market." *Ibid.* Nevertheless, the court concluded that setting the price of ingot too high for the independent rollers to earn a living profit was "an unlawful exercise of [Alcoa's] power." *Ibid.* The court thus treated the price squeeze as unlawful, without regard to its contribution to the acquisition or maintenance of monopoly power or its relationship to any attempt to monopolize. That reasoning, which applied Section 2 to unilateral conduct that was neither monopolization nor attempted monopolization, was "incorrect." 3A *Antitrust Law* ¶ 767d2, at 131. See *Trinko*, 540 U.S. at 415 n.4 (rejecting a monopoly leveraging theory, noting that "[t]o the extent the Court of Appeals dispensed with a requirement that there be a 'dangerous probability of success' in monopolizing a second market, it erred").

In addition, the concepts on which *Alcoa* relied—"fair price," a price too high to allow downstream competitors a

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[15] It did this for various types and gauges of sheet for the years 1925-1933. For 31 of the 112 computations, there was no available profit. Concluding Alcoa increased the margin beginning in 1933 out of fear of "action by the Department" of Justice, the court performed similar computations for 1933-1937, yielding much higher average available profit figures. *Alcoa*, 148 F.2d at 437.

"living profit," or one too high to allow them to compete—are vague, imprecise, and can be unmeasurable. See *Town of Concord*, 915 F.2d at 25. But the flaw in *Alcoa*'s approach goes beyond difficulties in administration: it lacks any clear relationship to protecting marketplace competition or consumer welfare. A legal rule that requires a vertically-integrated defendant to charge wholesale and retail prices that ensure its rivals—regardless of their efficiency—a "fair price" or "living profit" protects competitors, not competition or consumers. Under this Court's cases, however, a firm's conduct may not be judged anticompetitive, predatory, or exclusionary "by simply considering its effect on" competitors. *Aspen*, 472 U.S. at 605.

Moreover, in most situations, mitigating a squeeze through application of the antitrust laws would require interference with the free-market price-setting mechanism ordinarily protected by those laws. In particular, such a forced increase of the margin between the defendant's wholesale and retail prices would entail the substitution of judicial regulation of prices for the market in one of two ways: either by holding down the upstream price or by requiring "firms to maintain supracompetitive prices" downstream, "thus depriving consumers of the benefits of lower prices." *Brooke Group*, 509 U.S. at 224. But an antitrust court is unlikely to be an effective rate-setter, much less "an effective day-to-day enforcer" of such rates. *Trinko*, 540 U.S. at 415; see *Town of Concord*, 915 F.2d at 25 (observing that "antitrust courts normally avoid direct price administration"). Rather, any anticompetitive effects from a price squeeze are likely to be "beyond the practical ability of a judicial tribunal to control." *Brooke Group*, 509 U.S. at 223.[16]

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[16] Contrary to the Federal Trade Commission's (FTC) suggestion (see Resp. Supp. Cert. Br. 10a-11a & n.4), *Alcoa*'s "available profit" cal-

3. To be sure, there may be cases in which a defendant's prices are set for exclusionary purposes, but no antitrust liability would arise under the combined holdings of *Trinko* and *Brooke Group* because the defendant has neither violated an antitrust duty to deal nor priced below cost. Indeed, the Court expressly recognized in *Brooke Group* that its standard might permit some anticompetitive price-cutting, *i.e.*, price-cutting that would exclude rivals on a basis other than efficiency. Specifically, the Court observed that above-cost pricing could sometimes be used "to induce or reestablish supracompetitive pricing," *Brooke Group*, 509 U.S. at 224, and implicitly acknowledged that, even absent recoupment, below-cost pricing could allow a predator to establish short-term market power by injuring and driving out its rivals—until new competitors entered the

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culations bear no relation to the *Brooke Group* requirement of below-cost pricing. The *Brooke Group* standard would have required consideration of whether Alcoa's price for sheet was below *Alcoa*'s total cost of producing sheet—which included not only Alcoa's cost of rolling ingot into sheet (which the Second Circuit did consider) but also Alcoa's cost of producing ingot. To perform that calculation, the Second Circuit would have needed to know Alcoa's cost of producing ingot. But, as the district court observed, the government did not "introduce in evidence the facts showing the cost of producing ingot." *Alcoa*, 44 F. Supp. at 219. Thus, instead of measuring whether Alcoa sold sheet below any relevant measure of its actual cost of producing sheet, the Second Circuit compared Alcoa's price for sheet with its *rivals'* cost of producing sheet. The rivals' cost, however, necessarily included not only their costs of rolling ingot into sheet, but also the monopoly price that they paid to Alcoa for ingot—a monopoly price that was not in itself unlawful. The Second Circuit therefore measured the wrong thing: by comparing Alcoa's price for sheet with its rivals' cost of producing sheet, it merely demonstrated that the rivals were indeed squeezed. It did not demonstrate the existence of conduct that, under this Court's modern antitrust jurisprudence, the antitrust laws were designed to prevent.

market and drove the market price back down. *Id.* at 224-225.

But whether or not such prices are the downstream component of a price squeeze, their exclusionary effect, even if not simply a reflection of one party's cost structure and therefore of competition on the merits, "is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting." *Brooke Group*, 509 U.S. at 223. As the Court explained, a looser standard would run the risk of imposing liability in cases involving procompetitive price-cutting, and "the costs of [such] an erroneous finding of liability are high," *id.* at 226, because such errors (or "false positives") would "chill the very conduct the antitrust laws are designed to protect," *ibid.* (internal quotation marks and citation omitted). The risk that such "false positives" will occur under a looser standard is substantial, the Court explained, because "[t]he mechanism by which a firm engages in predatory pricing—lowering prices—is the same mechanism by which a firm stimulates competition." *Ibid.* (internal quotation marks and citation omitted) (brackets in original); see *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227, 231 (1st Cir. 1983) (Breyer, J.) (observing that "a legal precedent or rule of law that prevents a firm from unilaterally cutting its prices risks interference with one of the Sherman Act's most basic objectives: the low price levels that one would find in well-functioning competitive markets").

It is also true that a margin-based price squeeze could in theory inflict anticompetitive harms. In *Town of Concord*, the First Circuit discussed two potential harms it viewed as "the most important of those that favor prohibiting a price squeeze," although it recognized that scholars disputed their "practical significance." 915 F.2d at 24. First, extending the upstream monopoly to the downstream level could

"raise[] 'entry barriers,' thereby fortifying [the upstream] monopoly position." *Id.* at 23. Absent formidable preexisting entry barriers upstream, however, there would be no upstream monopoly. Thus, as a leading treatise concludes, "[e]ven when a monopolist at one essential stage 'monopolizes' a second stage, consumer harm cannot be inferred and is difficult to identify. * * * [W]e think competitive injury is the exception rather than the rule." 3A *Antitrust Law* ¶ 756b at 11; see *id.* ¶ 756c3 at 20 ("adverse effects are far from certain").

Second, preserving downstream competitors can provide *non-price* competition that may result in consumer benefits. *Town of Concord*, 915 F.2d at 24. But interfering with pricing in the marketplace in order to preserve the benefits of non-price competition is not sound antitrust policy, particularly because the second-level firms may not be especially innovative. Although the *Town of Concord* court was "willing to assume" those two potential harms would justify prohibiting price squeezes "were there nothing to be said in favor of permitting prices that could create such a squeeze," *ibid.*, it recognized that there are strong reasons to permit such prices. Likewise, on balance there is no sufficiently sound foundation for prohibiting price squeezes based solely on the margin between a vertically-integrated defendant's wholesale and retail prices.[17]

That conclusion holds true whether the relevant market is regulated, partially regulated, or unregulated. In *Town of Concord*, while declining to apply *Alcoa* to a fully regulated industry, 915 F.2d at 28, the First Circuit observed "that a special problem is posed by a monopolist, regulated at only one level, who seeks to dominate a second, unregu-

[17] In reaching a contrary conclusion, see Resp. Supp. Cert. Br. 1a-14a, the FTC relied primarily on the Second Circuit's outmoded decision in *Alcoa* and failed to take sufficient account of *Trinko*, *Brooke Group*, and this Court's other recent antitrust jurisprudence.

lated level, in order to earn at that second level the very profits that regulation forbids at the first," *id.* at 29. But that is essentially a problem of regulatory evasion, not of antitrust law. Cf. *NYNEX Corp.* v. *Discon, Inc.*, 525 U.S. 128, 135-137 (1998) (emphasizing importance of showing harm to "competitive process" and distinguishing "the exercise of market power that is *lawfully* in the hands of a monopolist" even if combined with regulatory evasion). Moreover, even though the FCC regulates only petitioners' wholesale rates, it can consider price-squeeze allegations as a matter of regulatory law in assessing those rates. See, *e.g.*, *FPC* v. *Conway Corp.*, 426 U.S. 271 (1976) (holding that the FPC can consider allegations of price squeeze by regulated firm even though retail rates were not within its jurisdiction); *Sprint Commc'ns Co.* v. *FCC*, 274 F.3d 549 (D.C. Cir. 2001) (holding that FCC can consider price squeeze allegations in public interest determination although retail rates are not within its jurisdiction). In any event, if, as suggested above, there is no sound basis to treat margin-based price squeezes as antitrust violations even in unregulated markets, there is surely no reason to do so in wholly or partially regulated markets.

4. Like the Second Circuit's theory in *Alcoa*, the price-squeeze theory reaffirmed by the Ninth Circuit forbids pricing wholesale inputs so high that the defendant's "customers cannot compete with it in the second-level" market. Pet. App. 8a (internal quotation marks omitted). Under that reasoning, what makes the conduct purportedly unlawful is its adverse effect on a competitor. See J.A. 17 (¶ 19) (alleging that petitioners' price squeeze placed respondents at a "serious unfair disadvantage"). But, for all the reasons explained above, a complaint in which the allegations of anticompetitive conduct are limited to such a squeeze does not suffice to establish that "the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); see *Bell Atl. Corp.* v. *Twombly*,

127 S. Ct. 1955, 1965 (2007) (noting that a complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level"). The court of appeals was therefore wrong to conclude that respondents' price-squeeze allegations stated a valid antitrust claim.[18]

Accordingly, respondents' price-squeeze theory could not sufficiently state a claim without additional allegations of anticompetitive conduct. Allegations satisfying the *Brooke Group* requirements with respect to the retail market might suffice. But then the gravamen of the complaint would no longer be a price squeeze (*i.e.*, an insufficient margin between wholesale and retail prices) as such, but rather the predatory nature of petitioners' retail price. As the dissent concluded (Pet. App. 20a-21a), for such a complaint to be viable, it would have to satisfy *Brooke Group* by alleging that "the prices complained of are below an appropriate measure of its rival's costs" and that the defendant had "a dangerous probability[] of recouping its investment in below-cost prices." 509 U.S. at 222, 224.

The panel majority adverted to the possibility that respondents "could prove facts, consistent with [their] complaint, that involve only unregulated behavior at the retail level." Pet. App. 18a. But unlike the dissenting judge, the majority did not hold or suggest that a price-squeeze complaint must contain allegations sufficient to satisfy the *Brooke Group* standard in order to survive a motion for judgment on the pleadings. *Id.* at 19a. The Ninth Circuit's reaffirmation (*id.* at 14a) of "price squeeze theory" as a

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[18] In contrast, two other circuits have correctly recognized that *Trinko* and *Brooke Group* combine to bar a margin-based price-squeeze claim. See *Covad Commc'ns Co.* v. *BellSouth Corp.*, 374 F.3d 1044 (11th Cir. 2004), cert. denied, 544 U.S. 904 (2005); *Covad Commc'ns Co.* v. *Bell Atl. Corp.*, 398 F.3d 666, 673-674 (D.C. Cir.), order on denial of reh'g, 407 F.3d 1220, 1222 (D.C. Cir. 2005); see also U.S. Invitation Br. 15-16.

"viable" and independent "part of the fabric of traditional antitrust law" cannot be squared with this Court's modern antitrust cases.

CONCLUSION

The judgment below should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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